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No. 74-161

In the
Supreme Court of the United States
OCTOBER TERM, 1974

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

vs.

FRANCIS V. HEATER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OPINION BELOW
(No. 73-1133)

The opinion of the Court of Appeals (No. 73-1133) is printed as Appendix A *infra* and is dated June 5, 1974, ... F.2d .....

GROUNDS OF JURISDICTION

This is a case for personal injuries under the Federal Employers' Liability Act, 45 U.S.C.A. 51 et seq. The jurisdiction of this court is invoked to review errors of law in the Trial and Appellate Court. Both courts have de-

cided questions contrary to the applicable decisions of this court. The Appellate Court has decided a matter of Federal Law in a manner conflicting with a decision in a sister Court of Appeal.

JUDGMENT BELOW

The Trial Court entered judgment on the jury verdict in the amount of $100,000.00 on November 14, 1972 and entered an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial or in the alternative for a remittitur, December 4, 1972.

This judgment was appealed to the Court of Appeals for the Seventh Circuit which affirmed the Trial Court by a judgment entered June 5, 1974. Defendant's petition for rehearing was denied on June 27, 1974.

JURISDICTIONAL STATUTE

The jurisdiction of this court is sought under 28 U.S.C.A. (1).

QUESTIONS PRESENTED

I.

Must plaintiff in a F.E.L.A. case produce evidence explaining to jury the method of computing present value, when such plaintiff seeks future damages which must be reduced to this present value?

II.

In a F.E.L.A. case, is the giving to a jury an assumption of risk instruction, *reversible* error, when the issue is not involved in the case?

III.

Does plaintiff in a F.E.L.A. case make *prima facie* case for a jury when he testifies that he was injured, but is not able to connect the injury to the alleged negligent manner and method of performing the work?

STATUTES INVOLVED

45 U.S.C.A. §51

Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such

carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

45 U.S.C.A. §54

Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

45 U.S.C.A. §56

Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states.

Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, § 2, 53 Stat. 1404; June 25, 1948, c. 646, § 18, 62 Stat. 989.

28 U.S.C.A. §1254(1)

Courts of appeal; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

STATEMENT OF THE CASE

This was a case for personal injuries filed under the Federal Employers Liability Act. 45 U.S.C.A. § 56.

On March 6, 1969, plaintiff, Francis V. Heater, was working as a carman for The Chesapeake and Ohio Railway Company (C&O) at the Company's yard in Burnham, Illinois.

A carman's job consists of visually and physically inspecting freight cars (Tr. 23), noting defects on the cars inspected, and repairing any defective cars (Tr. 24). Certain aspects of the work are hard physical labor (Tr. 198).

Plaintiff had worked for The Chesapeake and Ohio Railway Company in 1946 and 1947 as a carman (Tr. 22), had worked for the Pennsylvania Railroad for some period of time after that and had returned to work for the Chesapeake and Ohio Railway Company in July, 1964. He was 47 years of age.

On March 6, 1969, he, Henry Rzyski and Mr. Baker were working in a box car in order to move a portion of a load of "yokes" out of the doorway so that they could place timbers across the door opening (Tr. 28). The load had shifted enroute and knocked the door off (Tr. 28). Yokes are portions of the coupling apparatus of freight cars and

measure approximately 40 to 41 inches long, 7 to 8 inches wide at one end and 10 to 11 inches wide at the other (Tr. 168-9). A picture of a "yoke" was introduced into evidence as plaintiff's Exhibits 30 and 31. A fourth man was working on the ground outside the car (T. 33).

Mr. Heater testified that he was not sure but that he "thinks" a yoke weighed about 300 pounds (Tr. 36). According to Mr. Rzyski, a yoke weighed about 200 pounds (Tr. 176-7).

The yokes in question had shifted so that some of them protruded 6 to 10 inches through the doorway (Tr. 30). In order to permit the car to continue on its journey, it was necessary to move the yokes which were approximately 6 to 8 across and 3 levels high (Tr. 167) into the car so that they would clear the door.

There was dispute in the evidence as to the method of moving these yokes. Mr. Rzyski, who was acting as gang boss, testified that in most instances the yokes could be slid, pushed or balanced rather than lifted (Tr. 173-4). Mr. Heater, however, testified that they were lifted. At the time of the alleged occurrence, when between two-thirds and three-quarters of the yokes were moved, he felt a pain in his back (Tr. 39). Mr. Heater stated that he did not know the cause of the pain and said at page 39 of the Transcript:

> ". . . I don't know whether I lifted crooked, whether I slipped, or anything—I don't know whether I done that but I sure felt a pain in my back."

Heater then stopped for a minute and continued working (Tr. 49). He did not testify that he told Mr. Rzyski or anyone else about the incident at the time (Tr. 49) and Rzyski stated he had not been told about it by Heater

(Tr. 206). Heater waited for several days until the Trainmaster, saw him limping, asked what had happened and was told by Heater he had hurt his back several days before (Tr. 54-6). He was sent to a doctor and continued to work, including overtime (his time book, plaintiff's exhibit 34 a, shows, for example, eleven days of overtime work between the date of the accident, March 6, 1969, and April 20, 1969 and 25 days of overtime during the months of November and December, 1969), until June, 1971, when surgery was performed.

On March 6, 1969, the crew had a chain hoist called a come-along available (Tr. 41) but it was not usable inside a box car since it would not fit inside (Tr. 196-7).

Mr. Rzyski testified without contradiction that the only practical way to move these yokes in the box car was by hand; that lifting devices were not needed in this situation for use inside the box car (Tr. 197); that he had told Mr. Heater, who was a fast worker (Tr. 203) and who had been attempting to raise the yokes by himself, to slow down because there was extra help; and that Heater had not reported the incident to him when it happened (Tr. 206), although Rzyski was working right alongside him (Tr. 206).

Yokes are handled by carmen all the time in repairing a car (Tr. 198). Rzyski and Heater had replaced yokes on freight cars many times (Tr. 201).

Mr. Heater, while working as a carman, had made an application to work as a brakeman. This job would have required him to run alongside the train to make cuts, and to climb the sides of box cars and moving equipment, and is heavy labor (Tr. 143). It was different work than that of a carman (Tr. 143). He was found "not qualified" for that job on June 14, 1968.

Without the knowledge of the railroad, Mr. Heater had received treatment for his back in May, 1967 (Tr. 448-50). Subsequently, he had received treatments on September 30, 1968 (Tr. 451) and December 31, 1968 (Tr. 452) and at the request of Dr. Fish, the results of the examination for brakeman were forwarded to him. Nevertheless, Mr. Heater testified that on the morning of March 6, 1969 he felt "normal"—"felt good" (Tr. 27).

Dr. Remich, who treated Mr. Heater for his back after March 6, 1969, testified that by September 26, 1969, Mr. Heater had recovered from the muscular strain of March 6, 1969 and had returned to the status he had been in prior to that day (Tr. 518).

After the alleged incident of March 6, 1969, plaintiff worked, with some days off but also with overtime work, until surgery was performed by Dr. Ferguson on June 10, 1971 (Tr. 374). During the recovery period, thirteen days after surgery, he had distress subsequently diagnosed as a myocardial infarction.

Dr. Ferguson, who performed the operation, testified that by February 1, 1972, he could, insofar as the back was concerned, return to his normal work (Tr. 378). Dr. Leonard Smith, an expert who examined him once at the request of plaintiff's attorney on October 24, 1972, testified that the fusion at L-4-L-5 had failed and that he is incapacitated for gainful employment (Tr. 407). Plaintiff has not returned to work since the surgery.

Dr. Deur, a heart consultant who saw Mr. Heater in the hospital during the initial distress thirteen days after the operation, testified that the surgical procedure was not related to the distress (Tr. 341), and that although surgical procedure would cause stress, he could not say the

occlusion was related to the emotional stress of the operation (Tr. 340). He testified that the anaesthesia at the operation did not precipitate the coronary problem thirteen days later (Tr. 333) and that the electrocardiogram had returned to its previous state (Tr. 337). Dr. Kuippers, a heart specialist consulted by Dr. Deur, testified that although surgery could precipitate an infarction, the time interval in this case was unusual (Tr. 357-8).

Dr. Golden, a Chicago heart specialist who examined plaintiff once at the request of plaintiff's lawyer, testified that the heart difficulties were precipitated by the improper administration of anaesthesia at the operation (Tr. 244), and could have been avoided by proper operating room care (Tr. 249-50).

The case was tried before the District Court, resulting in a verdict for plaintiff in the amount of $10,000.00. Defendant's post-trial motions for judgment notwithstanding the verdict in accordance with defendant's motion for a directed verdict at the end of all the evidence, for a new trial or for a remittitur were denied and the appeal duly taken.

As noted above, the Trial Court has been affirmed by the Court of Appeals.

ARGUMENT

QUESTION I

Must plaintiff in a F.E.L.A. case produce evidence explaining to jury the method of computing present value, when such plaintiff seeks future damages which must be reduced to this present value?

In determining that plaintiff need not produce proof of the method of determining present value, the Seventh Circuit has decided a matter of Federal Law contrary to the decisions of the Third Circuit and in conflict with the decisions of this Court.

At the trial, the plaintiff requested and the court gave the following instructions to the jury (TR 644-647):

> "In the event that you find that Plaintiff is entitled to damages arising in the future because of injuries or because of further medical expenses or because or loss of earnings, you must determine the amount of these damages which will arise in the future.
>
> "If these damages are of a continuing nature, you may consider how long they will continue. If they are permanent in nature then in computing these damages you may consider how long the Plaintiff is likely to live.
>
> "With respect to a loss of future earnings, you may consider that some persons work all their lives and others do not; that a person's earnings may remain the same or may increase or decrease in the future.
>
> "According to a table of mortality in evidence, the life expectancy of a person aged 47 years is 27.2 years. This figure is not conclusive. It is the average life expectancy of persons who have reached the age of 47 years. It may be considered by you in connection

with other evidence relating to probable life expectancy of the Plaintiff in this case, including evidence of his occupation, health, habits, and other activities, bearing in mind that some persons live longer and some persons less than the average.

"In computing the damages arising in the future because of injuries, because of future medical expenses, or because of the loss of future earnings, you must not simply multiply the damages by the length of time you have found they will continue or by the number of years you have found that the Plaintiff is likely to live. Instead, you must determine their present cash value. 'Present cash value' means the sum of money needed now, when added to what that sum may reasonably be expected to earn in the future, will equal the amount of damages, expenses and earnings at the time in the future when the damage from the injury will be suffered, the expenses must be paid, or the earnings would have been received.

"Damages for pain and suffering and disability are not reduced to present cash value.

"If you decide for the Plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damage proved by the evidence to have resulted from the negligence of the Defendant:

"Whether any of these elements of damages has been proved by the evidence is for you to determine."

Defendant objected to the instructions (TR. 561-2) for the reason there was no evidence adduced at this trial to explain to a jury the method and manner of determining present value of alleged future damages.

Defendant cited *Ballentine* v. *Central Railroad of New Jersey*, 460 F.2d 540 (1972), cert. den. 93 S.Ct. 133

(CA3). This was a F.E.L.A. case where the court said at p. 543:

> The application of the present worth rule is generally conceded to be beyond the understainding and capabilities of most lay persons serving on juries. At the very least, it is a tedious and laborious task. The involved process of reducing future losses to present worth has, undoubtedly, led to confusion and guesswork verdicts. Reason, logic and fairness would, therefore, dictate that enlightenment is necessary.

The court continued on p. 544:

> We hold that once evidence is presented and recovery is sought for future lost earnings, the jury is entitled to receive evidence and appropriate mathematical guidance on the method of reducing lost future earnings to present worth, if they are to act rationally and "not upon mere conjecture and guess."

In the instant case, the Seventh Circuit said (appendix p. 10a):

> "We cannot accept such a dismal evaluation of the capabilities of the average juror. Rather, we prefer the position taken by the Sixth Circuit in *Pennsylvania R.R. Co.* v. *McKinley*, 288 F.2d 262 (6th Cir. 1961)."

The Sixth Circuit case, referred to, held that evidence as to the interest rates and the method of calculating present value is not required in F.E.L.A. cases.

There is no doubt but that, under F.E.L.A., jury awards of lost future earnings and the like should be reduced to present value, *Gulf, Colorado & Santa Fe Railway Company* v. *Moser, Administratrix*, 275 U.S. 133.

This court considered this precise evidence problem in *Chesapeake & Ohio Railway Company* v. *Kelly, Administratrix of Kelly*, 241 U.S. 485, 491, where it said:

> We are aware that it may be a difficult mathematical computation for the ordinary juryman to calculate interest on deferred payments, with annual rates, and reach a present cash value. Whether the difficulty should be met by admitting the testimony of expert witnesses, or by receiving in evidence the standard interest and annuity tables in which present values are worked out at various rates of interest and for various periods covering the ordinary expectancies of life, it is not for us in this case to say. Like other questions of procedure and evidence, it is to be determined according to the law of the forum.
>
> But the question of the proper measure of damages is inseparably connected with the right of action, and in cases arising under the Federal Employer's Liability Act it must be settled according to general principles of law as administered in the Federal courts.

This court recognized the difficulties the jury faced in calculating present value but set no rules as to the type of proof required. Nonetheless, it obviously expected some evidence would be forthcoming to permit jurors to intelligently perform their function.

This Court is requested, in this case, to make it clear to the lower courts that when a plaintiff wishes to claim future damages in a F.E.L.A. jury case, such a plaintiff's burden of proof includes the necessity of providing adequate evidence to guide the jury in determining present value.

QUESTION II

In a F.E.L.A. case, is the giving to a jury an assumption of risk instruction, reversible error, when the issue is not involved in the case?

At the trial, plaintiff asked for and the court gave the following instructions (TR 640) (appendix p. 16a):

> "At the time of the occurrence there was in force a federal statute which provided that in any action brought against a railroad company to recover damages for injury to an employee, the employee shall not be held to have assumed the risks of his employment in any case where the injury resulted in whole or in part from the negligence of any of the officers, agents or employees of the railroad."

This instruction is based upon 45 U.S.C.A. §54. In its opinion the Appellate Court said (Appendix p. 8a):

> As the plaintiff concedes, the use of an assumption of risk instruction in an FELA case has been condemned by this and other courts. Such an instruction is a confusing, negative statement which refers to issues not involved in an FELA case. "[T]he statutory elimination of the defense of assumption of risk, when read to the jury in FELA cases where that 'defense' has been neither pleaded nor argued, serves only to obscure the issues in the case." *Casko* v. *Elgin, Joliet & Eastern Ry Co.*, 261 F.2d 748, 751 (7th Cir. 1966). See also *Almendarez* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 426 F.2d 1095, 1098 (5th Cir. 1970); *Dilley* v. *Chesapeake & Ohio Ry. Co.*, 327 F.2d 249, 253 (6th Cir. 1964); *Seaboldt* v. *Pennsylvania R.R. Co.*, 290 F.2d 296, 300 (3d Cir. 1961). Despite the clear admonitions of this and other courts, however, the plaintiff, nevertheless, requested and obtained just such an assumption of risk instruction.

> We are seriously concerned with whether or not reversal may be required by the giving of this instruction. The warnings of this court should not be ignored. In the instant case, assumption of the risk was not an issue. Arguably a jury might be confused when suddenly presented with an uncontested issue in jury instructions. We find no case, however, in which the giving of the improper assumption of risk instruction in an FELA case was *alone* held to be reversible error. Although a close question is created, particularly in view of the combination with the matter of treating Rzyski as an adverse witness, we will follow *Casko* in the present case and not reverse. We do wish to emphasize, however, that use of the improper assumption of risk instruction may be sufficient in other cases, when combined with other more substantial error, to constitute reversible error.

Obviously the court felt that the error was so-called "harmless error". Yet this can only be conjecture by the court.

The error and its effect upon the outcome of the case occurred within the secret recesses of the jury room. Neither the parties nor the court are permitted to penetrate that sanctum. How then can it be rationally said that the deliberate error, injected into this case by the plaintiff, over objection, was harmless to the defendant.

In *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500, this court said at page 509:

> Cognizant of the duty of effectuate the intention of the Congress to secure the right to a jury determination, this Court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination.

How can it be said that defendant secured its right to a proper jury determination of its responsibility, if any, in this case. The verdict is most assuredly tainted with error, not of defendant's doing, and that same verdict and resulting judgment commands defendant to pay plaintiff $100,000.00.

This Court is asked to vindicate defendant's right to a jury trial and a properly instructed jury. Defendant was entitled to a reduction of plaintiff's damages to the extent the jury found plaintiff's contributory negligence caused his own injuries. For all that we know, the confusion injected into the case by the assumption of risk instruction deprived defendant of its right in this respect.

As this Court said in *Tiller* v. *Atlantic Coast Line Railroad Company,* 318 U.S. 54, 64:

> It was this maze of law which Congress swept into discard with the adoption of the 1939 amendment to the Employers' Liability Act, releasing the employee from the burden of assumption of risk by whatever name it was called. *The result is an Act which requires cases tried under the Federal Act to be handled as though no doctrine of assumption of risk had ever existed.* (Emphasis Added)

In his concurring opinion in the same case, Justice Frankfurter observed at p. 72:

> "Assumption of risk" as a defense where there is negligence has been written out of the Act. But "assumption of risk," in the sense that the employer is not liable for those risks which it could not avoid in the observance of its duty of care, has not been written out of the law. Because of its ambiguity the phrase "assumption of risk" is a hazardous legal tool. As a means of instructing a jury, it is bound to create confusion. It should therefore be discarded.

In this case this Court is asked to correct the error of injecting assumption of risk into F.E.L.A. cases.

QUESTION III

Does plaintiff in a F.E.L.A. case make prima facie case for a jury when he testifies that he was injured, but is not able to connect the injury to the alleged negligent manner and method of performing the work?

The fact is, that in this case there is no evidence of negligence or of the cause of the accident. There is not even a basis for hypothesizing or guessing as is allowed in so many F.E.L.A. cases. For the one and only person who knew about the incident itself at the very time it happened, does not know what happened. Plaintiff, who did *not* report it at the time to his gang boss, says only:

> "Oh, we was probably two-thirds, maybe three-fourths done with them, and I *don't know* whether I lifted crooked, whether I slipped, or anything—I *don't know* whether I done that, but I sure felt a pain in my back." (emphasis supplied)

Here there is an absolute disavowal of any knowledge of the mechanics of the incident by the only person aware of it and the only one in a position to know. In fact, plaintiff is unable to say that he injured himself while allegedly lifting or handling a yoke.

Certainly, a negative statement of lack of knowledge hardly can be inverted into a positive statement of responsibility.

Ignoring this gap in the proof, plaintiff's counsel suggests that plaintiff was indeed injured while lifting and that defendant was negligent for not furnishing additional help or some mechanical means of moving the yokes, such as:

1). A tripod—The only evidence on this came from leading questions addressed to Mr. Rzyski, the gang boss, as an adverse witness. Mr. Rzyski also testified that there was no place to install a tripod (Tr. 195).

2). A chain and hoist or "come-along". Again there was no way to use this inside a box car since there was nothing to hook onto—you would be pulling one yoke against another to see which would give first. (Tr. 195-7). This was limited to use outside the box cars (Tr. 197).

3). A chain for 4 men to lift, however, Mr. Rzyski testified that if this were done, he would be afraid to pick them up (Tr. 178).

4). Lastly, to push the yokes out of the car, thus risking some damage to the cargo, and necessitating a reloading by use of a crane.

One supposes that plaintiff's counsel infers that given such mechanical help, all physical activities on the part of plaintiff would have been avoided. There is no proof whatsover to support such a claim.

Plaintiff says that he might have "slipped" while in the car. Use of any of the mechanical aids suggested or the presence additional help presupposes physical activity within the freight car by plaintiff.

Chains don't hook themselves, plaintiff himself admits that. (TR 37).

This Court said in *Rogers* v. *Missouri Pacific Railroad Company Supra*, p. 506:

> Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part even the

> slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence.
>
> Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due "in whole or *in part*" to its negligence. (Emphasis added.)

This court still requires that the proof be such that the jury "with reason" find that the negligence of the employer "probably" caused the injuries to plaintiff.

If the jury did find that plaintiff wouldn't have been injured if the mechanical or physical help suggested was furnished, such a finding would have of necessity been pure conjecture. There is no evidence that plaintiff's activities would have been substantially different than they were acting, as he was, without the suggested mechanical or human help.

The court below says (Appendix p. 5a):

> "Admittedly, Heater could not say whether the pain arose from lifting or whether his foot also slipped or he bent over at an odd angle."

Surely "reason" requires more than this!

CONCLUSION

For the reasons set forth above, and because of the demands of the law and substantial justice, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1973 SEPTEMBER SESSION, 1973

No. 73-1133

FRANCIS V. HEATER,
Plaintiff-Appellee,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 72 C 174

WILLIAM J. LYNCH,
Judge.

ARGUED NOVEMBER 30, 1973 — DECIDED JUNE 5, 1974

Before CLARK*, *Associate Justice*, CUMMINGS and PELL, *Circuit Judges.*

PELL, *Circuit Judge.* Francis Heater, plaintiff-appellee, brought this action to recover damages for personal injuries under the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.* The jury awarded damages to the plaintiff in the amount of $100,000. The defendant, the Chesapeake and Ohio Railway Company, appeals.

* Associate Justice Tom C. Clark (Retired) of the United States Supreme Court is sitting by designation.

Viewing the evidence, as we must, from the point of view most favorable to the party prevailing on trial, it fairly establishes the following. Heater was employed by the defendant railroad as a carman, a job which required that he inspect and repair railroad cars. On March 3, 1969, the railroad's car foreman asked Heater and another employee to assist him in moving a load of yokes which were partially projecting through the door opening of a boxcar. Each yoke was approximately forty inches long, seven to eight inches wide at one end and ten to eleven inches wide at the other end, and each weighed over two hundred pounds. The yokes were stacked inside the boxcar approximately three levels high and six to eight across. The men did the work entirely by hand without the aid of any mechanical equipment.

While lifting one of the yokes, Heater felt a sharp pain in his back. Heater hesitated for a minute before he did any further work. He later mentioned to the foreman that he would like to take a short rest. Heater did, however, continue working that day. A few days thereafter the Trainmaster saw Heater limping and sent him to a doctor. In June 1971, surgery was performed on Heater's back. He had continued to work from the time of the accident until the operation. Thirteen days after the surgery, Heater suffered a heart attack and has not worked since then.

The railroad raises a number of issues on appeal: (1) whether the district court properly submitted the matter to the jury; (2) whether the court abused its discretion in permitting plaintiff's counsel to call the car foreman as an adverse witness; (3) whether the court committed error in connection with the giving of instructions.

I

The defendant contends that the plaintiff failed to present sufficient evidence of either negligence or causation to create a jury question. With respect to negligence,

the railroad argues that yokes were often lifted by hand in repair work. There was, moreover, no mechanical device which could be effectively used, according to the defendant, to rearrange yokes inside a boxcar. The railroad thus contends that the mere fact that Heater was required to move the yokes by hand was not evidence of negligence. The railroad further argues that even if the requirement that the yokes be lifted is deemed negligence, the plaintiff failed to prove that the lifting was the cause of his back injury and subsequent heart problem. In particular, the defendant points out that, at the trial, Heater himselft admitted not knowing the cause of his back pain:

> "... I don't know whether I lifted crooked, whether I slipped, or anything—I don't know whether I done that, but I sure felt a pain in my back."

Under the Federal Employers' Liability Act, the plaintiff must show both negligence on the part of the employer and causation. "The Act does not make the employer an insurer." *Inman* v. *Baltimore & Ohio R.R. Co.*, 361 U.S. 138, 140 (1959).

Having accorded the customary, albeit somewhat psittacistic, deference to the non-insurer aspect of the FELA defendant, we will now proceed to discuss that statute as it is. Before doing so, we observe that while the FELA in its terms does not purport to border on a workman's compensation act, certain parallelisms may be found. We will not assume that Congress is unaware of the judicial gloss that the Act has received. If the Act as it has been interpreted and applied does not correctly reflect what was intended by the legislative branch then the change must be made there. The duty of this court is to follow what is now well-established authority.

The quantum of evidence necessary to establish liability is much less in a FELA case than it would be in an ordinary negligence case. The FELA "was enacted because

the Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence." *Rogers* v. *Missouri Pac. R.R. Co.*, 352 U.S. 500, 507 (1957) (footnotes omitted).

The test of a jury case, under the FELA, "is simply whether the proofs justify with reason the conclusion that employer negligence played *any part, even the slightest*, in producing the injury or death for which damages are sought." *Id.* at 506 (emphasis added).[1] The fact that there may have been a number of causes of the injury is, therefore, irrelevant as long as one cause may be attributable to the railroad's negligence. In passing on the issues of fault and causality, moreover, the jury has a broad power to engage in inferences. "The very essence of [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable." *Tennant* v. *Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35 (1944). The jury's verdict can only be set aside "when there is a complete absence of probative facts to support the conclusion reached." *Lavender* v. *Kurn*, 327 U.S. 645, 653 (1946). The Supreme Court has repeatedly warned that in FELA cases, "courts

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[1] As one commentator has noted, the *Rogers* formulation of the test for a jury case under the FELA "reduce[s] the extent of the negligence required, as well as the quantum of proof necessary to establish it, to the 'vanishing point.' While it is still undoubtedly true that there must be some shreds of proof both of negligence and of causation, and that 'speculation, conjecture and possibilities' will not be enough, there appears to be little doubt that under the statute jury verdicts for the plaintiff can be sustained upon evidence which would not be sufficient in the ordinary negligence action." Prosser, *The Law of Torts* § 80, at 536 (4th ed. 1971) (footnotes omitted).

The Supreme Court itself has stated that "the power of decision in these actions [is] exclusively in the jury in all but the infrequent cases." *Rogers, supra* at 510.

are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Tennant* v. *Peoria & Pekin Union Ry. Co., supra* at 35.

In the present case, under the established standards to which we have adverted, plaintiff presented sufficient evidence of both negligence and causation to present a jury question. The railroad had assigned only three men—Heater, the car foreman, and another employee—to the task of rearranging the yokes. Heater and the foreman worked together, each lifting one end of the same yoke. This meant that each man was continually lifting a heavy load. Moreover, the railroad admitted that it would have been possible to have the men push the yokes out of the boxcar on to the ground, without lifting the yokes. A mechanical crane could then have been used to reload the yokes. Such a procedure might have been inefficient in the sense that it would have taken more time, but it was, nonetheless, possible and would have avoided having the men lift the yokes by hand. Furthermore, the car foreman testified that this procedure would probably not have harmed the yokes. The jury could reasonably have inferred, on the basis of such evidence, that the railroad was negligent in failing to use a mechanical crane or, at least, in failing to assign more men to the task.

There was also sufficient evidence for the jury to find that Heater's back pain and subsequent heart attack were caused, at least in part, by the lifting of the yokes. Admittedly, Heater could not say whether the pain arose from lifting or whether his foot also slipped or he bent over at an odd angle. Heater did testify, however, that the pain definitely began while he was doing the lifting. Moreover, a cardiologist testified that Heater's heart problems were the direct result of the operation on Heater's back. The jury could reasonably conclude that the lifting of the yokes was at least *part* of the cause of Heater's back pain and heart attack. "Judicial appraisal

of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played *any part at all* in the injury or death." *Rogers* v. *Missouri Pac. R.R. Co., supra* at 506-507 (emphasis added).

The question is not whether we would have reached the same conclusion as did the jury but rather whether there was sufficient evidence to permit the jury to reach the conclusion it did. Under established standards we must answer the question in the affirmative.

II

The railroad next contends that the district court erred in permitting the plaintiff to call the railroad's car foreman, Henry Rzyski, as an adverse witness under Rule 43(b), Fed. R. Civ. P. This ruling prejudiced defendant's case, it is argued, since it allowed plaintiff's counsel to cross-examine and impeach Rzyski.

Rule 43(b) provides, in pertinent part:

> "A party may call an adverse party or *an officer, director, or managing agent* of a public or private corporation ... which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party...." (Emphasis added.)

Rzyski was clearly not an officer or director of the railroad. The issue becomes whether the district court could correctly characterize him as a "managing agent" of the railroad.

Rule 43(b) "does not provide that any employee of an adverse party may be called adversely." *Hosie* v. *Chicago & North Western Ry. Co.*, 282 F.2d 639, 641 (7th Cir. 1960). An employee is a "managing agent" only if he acts with supervisory authority, being invested with general powers to exercise his discretion and judgment

in dealing with corporate matters and his interests are identified with those of the corporation. *Skogen* v. *Dow Chem. Co.*, 375 F.2d 692, 701 (8th Cir. 1967); *Brandon* v. *Art Centre Hosp.*, 366 F.2d 369, 372 (6th Cir. 1966).

In the present case, Rzyski was essentially a "gang boss." He personally inspected cars, wrote repair orders, and worked alongside his men on their jobs. His supervisory duties were limited to assigning carmen day by day to jobs, certifying that the men were at work, instructing men on how jobs were to be done, and seeing that accident reports were filled in and that injured men got to a doctor. Rzyski received his orders from a "car supervisor." Rzyski, moreover, had no power to hire or fire the men for his crew.

We find that such limited supervisory powers as Rzyski had are insufficient to make him a "managing agent" of the railroad. Rzyski, although he directed the work of his men, was far removed from having any general discretionary or managerial powers. See *Dowell, Inc.* v. *Jowers*, 182 F.2d 576 (5th Cir. 1950), in which the court held that an engineer in charge of the crew on which the plaintiff was working when injured was not a "managing agent."

The error in permitting Rzyski to be called as an adverse witness, however, in our opinion, does not require reversal. Having reviewed Rzyski's entire testimony, we are not convinced that the plaintiff gained any significant advantage by being able to cross-examine the foreman. We note, moreover, that if the plaintiff had not called Rzyski as an adverse witness, it is reasonable to assume that the railroad would have been under tactical compulsion to call him as a defense witness since Rzyski was in charge of the men lifting the yokes and was present when the injury occurred. If the railroad had so called Rzyski as a defense witness, plaintiff's counsel

would have been able to cross-examine the foreman and impeach his testimony.[2]

The trial of a law suit has been termed a quest for the truth and we do not assume that the information to which Rzyski testified would have been less truthful if he had been called other than as an adverse witness. We do not look with approval upon the district court not adhering to the plain language of the Federal Rules of Civil Procedure, which are to govern the trial when applicable, but instead following the practice which apparently prevails in the state courts of the state in which the district court was sitting. We decline, however, to visit our displeasure on the successful litigant where we are not convinced that the error was other than harmless.

III

The railroad argues, finally, that the district court erred in connection with the instructions which it gave to the jury.

The defense complains that the district court committed reversible error in giving an "assumption of risk" instruction. This instruction, using statutory language, essentially told the jury that the defense of assumption of risk is not available to a defendant in an FELA case.

As the plaintiff concedes, the use of an assumption of risk instruction in an FELA case has been condemned by this and other courts. Such an instruction is a confusing, negative statement which refers to issues not involved in an FELA case. "[T]he statutory elimination of the

[2] Had the railroad failed to call Rzyski to testify, this failure to do so would undoubtedly have been the subject of comment by plaintiff's counsel, and such comments might well have been more detrimental to the railroad's case than plaintiff's cross-exaination of Rzyski. Further, the failure to have called him in this event could have left plaintiff's testimony uncontradicted insofar as Rzyski did not agree with it.

defense of assumption of risk, when read to the jury in FELA cases where that 'defense' has been neither pleaded nor argued, serves only to obscure the issues in the case." *Casko* v. *Elgin, Joliet & Eastern Ry. Co.*, 361 F.2d 748, 751 (7th Cir. 1966). See also *Almendarez* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 426 F.2d 1095, 1098 (5th Cir. 1970); *Dilley* v. *Chesapeake & Ohio Ry. Co.*, 327 F.2d 249, 253 (6th Cir. 1964); *Seaboldt* v. *Pennsylvania R.R. Co.*, 290 F.2d 296, 300 (3rd Cir. 1961). Despite the clear admonitions of this and other courts, however, the plaintiff, nevertheless, requested and obtained just such an assumption of risk instruction.

We are seriously concerned with whether or not reversal may be required by the giving of this instruction. The warnings of this court should not be ignored. In the instant case, assumption of the risk was not an issue. Arguably a jury might be confused when suddenly presented with an uncontested issue in jury instructions. We find no case, however, in which the giving of the improper assumption of risk instruction in an FELA case was *alone* held to be reversible error. Although a close question is created, particularly in view of the combination with the matter of treating Rzyski as an adverse witness, we will follow *Casko* in the present case and not reverse. We do wish to emphasize, however, that use of the improper assumption of risk instruction may be sufficient in other cases, when combined with other more substantial error, to constitute reversible error.

The railroad complains next of the district court's instruction concerning the present value of future damages. At the trial, neither the plaintiff nor the defendant introduced any evidence suggesting a method for computing present value. In its instructions to the jury, the district court charged that any damage for loss of future earnings must be reduced to "present cash value."[3] The

[3] In its instruction the court charged, *inter alia*, that:
"In computing the damages arising in the future because of injuries, because of future medical expenses,

court did not instruct, however, on the method for computing present cash value. Although defense counsel neither tendered nor requested an instruction explaining the method of computation, the railroad now contends that the district court committed reversible error in failing so to instruct.

In raising this objection, the defense relies upon *Ballantine* v. *Central R.R.*, 460 F.2d 540 (3rd Cir. 1972), *cert. denied*, 409 U.S. 879, in which the Third Circuit held that where recovery is sought for future lost earnings, the plaintiff must submit evidence and the trial court must instruct on the method of reducing lost future earnings to present worth. The Third Circuit based its holding on the belief that "the application of the present worth rule is generally conceded to be beyond the understanding and capabilities of most lay persons serving on juries." 460 F.2d at 543.

We cannot accept such a dismal evaluation of the capabilities of the average juror.[4] Rather, we prefer the position taken by the Sixth Circuit in *Pennsylvania R.R.*

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[3] (Continued)

> or because of the loss of future earnings, you must not simply multiply the damages by the length of time you have found they will continue or by the number of years you have found that the Plaintiff is likely to live. Instead, you must determine their present cash value. 'Present cash value' means the sum of money needed now, which, when added to what that sum may reasonably be expected to earn in the future, will equal the amount of damages, expenses, and earnings at the time in the future when the damage from the injury will be suffered, the expenses must be paid, or the earnings would have been received."

[4] It is conceivable that a detailed and technical instruction, in the absence of trial testimony, as to the method of computing present value might be more confusing to a jury than would be the bare enunciation of the principle to which they could apply their common sense.

Co. v. *McKinley,* 288 F.2d 262 (6th Cir. 1961). In that case the court held that it was not reversible error to fail to instruct on the method of reducing an award to present value where the defense had not requested such an instruction. The Sixth Circuit specifically noted that:

> "[A] jury, unaided by specific testimony as to money values, could themselves, being told that the award should be only money value, properly apply the applicable rule.... Jurors are presumed to be intelligent people, generally aware, from today's economy and their own experience with it, of the earning value of money when placed in safe investments." 288 F.2d at 265.

The Eighth Circuit has recently taken the same position in *Duncan* v. *St. Louis-San Francisco Ry. Co.,* 480 F.2d 79, 87 (8th Cir. 1973). In *Duncan,* as in *McKinley,* the could held that a general instruction that future damages must be reduced to present worth was sufficient, in absence of a request by defense for a specific charge concerning the method of computation.

In the present case, the district court did instruct the jury that any damages for loss of future earnings must be reduced to "present cash value," a phrase which was then defined for the jury. Had the railroad wanted an instruction explaining the method of computation, defense counsel could easily have submitted one. This they failed to do. We hold that, under these circumstances, the instruction given by the district court was sufficient.

We have considered the other contentions raised with regard to the giving and refusing of instructions and are of the opinion that the district court adequately instructed the jury on both negligence and contributory negligence and that no reversible error is shown.

For the reasons set forth in this opinion the judgment of the district court is

AFFIRMED.

APPENDIX B

632 THE COURT CHARGED THE JURY AS FOLLOWS:

By The Court:

Ladies and gentlemen of the jury, now it becomes my duty to instruct you as to the law it pertains to this case.

Faithful performance by you of your duty is vital to the administration of justice.

The law applicable in this case is contained in these instructions and it is your duty to follow them. You must consider these instructions as a whole, not picking out one instruction and disregarding others.

It is your duty to determine the facts, and to determine them from the evidence produced in open court. You are to apply the law to the facts and in this way decide the case. Neither sympathy nor prejudice should influence you. Your verdict must be based on evidence and not upon speculation, guess or conjecture.

The evidence which you are to consider consists of testimony of the witnesses and the exhibits offered and received. The production of evidence in court is governed by rules of law. From time to time it has been my
633 duty as judge to rule on the admissibility of evidence.

You must not concern yourselves with the reasons for these rulings. And you are not to consider exhibits to which an objection was sustained or testimony or exhibits which were ordered stricken.

Arguments, statements and remarks of counsel are intended to help you in understanding the evidence and applying the law, but are not evidence. If any argument, statement or remark has no basis in the evidence, then you should disregard that argument, statement or remark. However, there is one exception to this rule: An admission of a fact by counsel is binding on his client.

The corporate defendant in this case is entitled to the same fair and unprejudiced treatment as an individual would be under the circumstances and you should decide the case with the same impartiality you would use in deciding a case between individuals.

Neither by these instructions, nor by any ruling or remark, or by any movement which I may have made during the course of this trial do I or have I meant to indicate any opinion as to the facts, for I have not.

634 It is your duty to consider this case the same as you would consider the case between two private citizens. The fact that defendant is a railroad company should not be influenced one way or another by sympathy road company is entitled to the same consideration from the jury as is given to private individuals in like circumstances. You should not be influenced in any way—you should not be influenced one way or another yb sympathy or prejudice. The plaintiff and defendant stand in law precisely the same as though each of them were individual people, and it is your duty to herein consider the evidence and these instructions with the same fairness and impartiality, and to arrive at the same verdict, as if this lawsuit were between individuals.

It is the right of an attorney to object to the introduction of evidence which he believes to be improper. Therefore you must not be prejudiced against a party in the case because the attorney for such party may have made such objections, regardless of the court's ruling thereon.

Whenever evidence was received for a limited pur-

635 pose, you should not consider it for any other purpose.

In determining whether any proposition has been proved, you should consider all of the evidence bearing on the question with regard to which party produced it.

A fact may be proved by circumstantial evidence. Circumstantial evidence consist of proof of facts or circumstances which give rise to a reasonable inference of the truth of the facts sought to be proved.

In considering the evidence in this case you are not required to set aside your own observation and experi-

ence in the affairs of life, but you have a right to consider all the evidence in the light of your own observations and experience in the affairs of life.

You are the sole judges of the credibility of the witnesses and of the weight to be given to the testimony of each of them. In determining the credit to be given any witness you may take into account his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias or prejudice he may have,
and the reasonableness of his testimony considered
636 in the light of all the evidence in the case.

An attorney has a right to interview a witness for the purpose of learning what testimony the witness will give. The fact that a witness has talked to an attorney and told him what he would testify to does not, by itself, reflect adversely on the truth of the testimony of the witness.

During the trial, certain evidence was presented to you by the reading of depositions. This evidence is entitled to neither more nor less consideration than you would give the same testimony had the witnesses appeared here in open court.

The credibility of a witness may be attacked by introducing evidence that on some former occasion the witness made a statement inconsistent with the testimony of the witness in this case on a matter of material to the issues. Evidence of this kind may be considered by you in connection with all of the other facts and circumstances in evidence in deciding the weight to be given to the testimony of that witness.

At the time of this occurrence there was in force and
effect a federal statute which provided that whenever
637 an employee of a railroad is injured while engaged
in the course of his employment, and the injury results in whole or in part from the negligence of any of the officers, agents or other employees of the railroad, then the railroad shall be liable in damages to the injured employee. Contributory negligence on the part of the injured employee shall not be a recovery, but the dam-

ages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

If you find that plaintiff's injury was proximately caused by a combination of plaintiff's contributory negligence and negligence on the part of the defendant, then in assessing the damages you should proceed in the following manner: First, determine the amount of the plaintiff's damages with reference to the question of contributory negligence. Second, decide — without reference to the question of contributory negligence. Third, decide what proportion of percentages of the total combined negligence of both parties causing the injury consisted of the plaintiff's negligence. Finally, reduce by this proportion or percentage the amount of damages you should have awarded had the plaintiff's negligence not contributed to the injury.

638 When I use the word "negligence" in these instructions, I mean the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do, under the circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide.

When I use the words "ordinary care", I mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under the circumstances. That is for you to decide.

It was the duty of the railroad to use ordinary care to provide the plaintiff with reasonably safe and suitable tools with which to do his work. Tools in order to be reasonably safe and suitable need not necessarily be the latest or best which could have been provided to do the work.

It was the duty of the railroad to use ordinary care to provide the plaintiff with a reasonably safe place in which to do his work.

639 It was the duty of the defendant, before and at the time of the occurrence, to use ordinary care for the safety of the plaintiff.

You are instructed that under the Federal Employers' Liability Act not every occurrence which results in injuries to an employee of a railroad company renders it liable. The employer is not held to an absolute responsibility for the reasonably safe condition of the premises, but only to the duty of exercising ordinary care under the circumstances to that end. The basis of the employers' liability is negligence, not the fact that injury occurred, and such negligence must be in whole or in part the cause of the injury. Consequently, if an occurrence is not caused in whole or in part by the alleged negligence of the railroad, then the railroad is not liable, even though the employee is injured while at work and on the railroad premises.

At the time of this occurrence plaintiff was in the course of his employment.

A person is in the course of his employment when he is doing anything he was employed to do, or when he is doing anything which his employment authorizes him to do, or which is reasonably incidental to the employment.

640 At the time of the occurrence there was in force a federal statute which provided that in any action brought against a railroad company to recover damages for injury to an employee, the employee shall not be held to have assumed the risks of his employment in any case where the injury resulted in whole or in part from the negligence of any of the officers, agents or employees of the railroad.

When I use the expression "contributory negligence", I mean negligence on the part of the plaintiff that proximately contributed to cause the alleged injury.

The burden of proving contributory negligence on the part of the plaintiff rests upon the railroad.

If you decide that the defendant was negligent and that its negligence was a proximate cause of injury to the plaintiff, it is not a defense that something else may also have been a cause of the injury.

When I use the expression "proximate cause," I mean any cause which, in natural or probable sequence, pro-

duced the injury complained of. It need not be the
641 only cause, nor the last or nearest cause. It is sufficient if it occurs with some other cause acting at the same time, which in combination with it, causes the injury.

Section 1 of the Federal Employers' Liability Act (45 U.S.C.A. Section 51) under which the plaintiff claims the right to recover damages in this section, provides in part that:

> "Every common carrier by railroad while engaging in commerce between any of the several states ... shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce ... for such injury ... resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier...."

It is agreed that, at the time and place alleged in the complaint, the defendant was a common carrier by railroad, engaged in interstate commerce; that the plaintiff was then an employee of the defendant, engaged in such commerce; and that the plaintiff's right, if any, to recover in this case is governed by the provisions of the Federal Employers' Liability Act.

642 The plaintiff claims he was injured and sustained damages while employed by the defendant railroad on March 6, 1969 and that the defendant was negligent in one or more of the following respects:

Maintained and repaired its equipment in a manner so as to cause injury to the plaintiff;

Failed to provide the plaintiff with a reasonably safe place to work;

Required the plaintiff to lift and move heavy objects and pieces of equipment without sufficient held or assistance.

Failed to exercise reasonable care in supervising and directing the work of the plaintiff;

Failed to protect the plaintiff from injury;

Failed to furnish the plaintiff with proper and appropriate tools, equipment and lifting devices to perform its work;

Permitted and required the plaintiff to lift heavy weights when the defendant had the knowledge of the plaintiff's injured or diseased spinal condition.

The plaintiff further claims that one or more of the
643 foregoing was a proximate cause of his injuries.

The defendant denies that it was negligent in doing any of the things claimed by the plaintiff, and denies that any claimed act or omission on the part of the defendant was a proximate cause of the claimed injuries.

The defendant also sets up the following affirmative defenses:

The plaintiff was guilty of negligence, a proximate cause or the sole proximate cause of his injuries.

The defendant further denies that the plaintiff was injured or sustained damages.

When I say that a party has the burden of proof on any proposition, or use the expression "if you find", or "if you decide", I mean you must be persuaded, considering all of the evidence in the case, that the proposition on which he has the burden of proof is more probably true than not true.

The plaintiff has the burden of proving each of the following propositions.

First, that the plaintiff was injured on March 6,
644 1969 while employed as a car man by the defendant.

Second, that the defendant acted or failed to act in one of the ways claimed by the plaintiff as stated to you in these instructions and that in so acting or failing to act, the defendant was negligent;

Third, that the plaintiff was injured;

Fourth, that the negligence of the defendant was a proximate cause of the injury to the plaintiff.

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff, but if on the other hand you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the defendant.

The defendant is a corporation and can act only through its officers and employees. Any act or omission of an officer or employee within the scope of his employment is the action or omission of the defendant corporation.

In the event that you find that plaintiff is entitled
645 to damages arising in the future because of injuries or because of future medical expenses or because of loss of earnings, you must determine the amount of these damages which will arise in the future.

If these damages are of a continuing nature, you may consider how long they will continue. If they are permanent in nature, then in computing these damages you may consider how long the plaintiff is likely to live.

With respect to a loss of future earnings, you may consider that some persons work all their lives and others do not; that a person's earnings may remain the same or may increase or decrease in the future.

According to a table of mortality in evidence, the life expectancy of a person aged 47 years is 27.2 years. This figure is not conclusive. It is the average life expectancy of persons who have reached the age of 47 years. It may be considered by you in connection with other evidence relating to probable life expectancy of the plaintiff in this case, including evidence of his occupation, health, habits and other activities, bearing in mind that some
persons live longer and some persons less than the
646 average.

In computing the damages arising in the future because of injuries, because of future medical expenses, or because of the loss of future earnings, you must not simply multiply the damages by the length of time you have found they will continue or by the numbers of years you have found that the paintiff is likely to live. Instead, you must determine their present cash value. "Present cash value" means the sum of money needed now, which, when added to what that sum may reasonably be expected to earn in the future, will equal the amount of damages, expenses and earnings at the time in the future when the damage from the injury will be suffered, the expenses must be paid, or the earnings would have been received.

Damages for pain and suffering and disability are not reduced to present cash value.

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damage proved by the evidence to have resulted from the negligence of the defendant:

647 The nature, extent and duration of the injury.

The disability resulting from the injury.

The pain and suffering experienced and reasonably certain to be experienced in the future as a result of the injury.

The reasonable expense of necessary medical care, treatment, and services received and the present cash value of the reasonable expenses of medical care, treatment and service reasonably certain to be received in the future.

The value of earnings lost and the present cash value of the earnings reasonably certain to be lost in the future.

The reasonable expense of necessary help in his home, which has been required as a result of his injury and the present cash value of such expense reasonably certain to be required in the future.

Whether any of these elements of damages has been proved by the evidence is for you to determine.

It was the duty of the plaintiff, before and at the 648 time of the occurrence, to use ordinary care for his own safety. That means it was the duty of the plaintiff to be free from contributory negligence.

Now, when you retire to consider your verdict you will be handed two forms of verdict. They will be signed by your foreman or forelady, as the case may be, and you will choose your foreman when you retire to your jury quarters, and I suggest that you do that expeditiously.

The first form of verdict which will be given to you by the marshal:

"We, the jury, find for the defendant and against the plaintiff."

And it will be signed by the foreman and the other five jurors.

And then:

"We, the jury, find for the plaintiff and against the defendant, and we assess the damages in the sum of ..... dollars."

And you will insert the amount of money, if you so find, and it will be signed by your foreman and the other five jurors.